RULES ON JOB HUNTING

AND

POST-GOVERNMENT EMPLOYMENT

FOR

SOLDIERS and DOD CIVILIAN EMPLOYEES

JULY 2006

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I. INTRODUCTION

This pamphlet covers the job hunting rules for current Federal employees (military and civilian), the rules for Soldiers on transition leave, the rules on post-government employment, and miscellaneous other rules.

WHICH RULES APPLY TO ME? This pamphlet discusses many different rules on job hunting and post-government employment. You can tell which rules apply to you by looking at the Table of Contents. After each rule, there is a description in brackets of who the rule applies to. For example, if the rule is followed by "[Officers & Enlisted]", this means it applies to military officers and enlisted Soldiers, but not to Federal civilian employees.

CONSULT YOUR ETHICS COUNSELOR. While this pamphlet summarizes the significant job hunting and post-government employment rules, it is not intended to be a full treatment of these subjects. Applying the rules to individual situations often requires careful analysis of several different rules, as well as the policies behind them. Deciding how the laws affect a particular situation is often difficult. This pamphlet should be used as general guidance, and should not be used to answer all of your questions. You should address specific questions to your Ethics Counselor. Depending on your command, your Ethics Counselor may be found at:

MEDCOM ..... **(210)221-8400/Bldg. 2792, Room 210**
AMEDDC&S and FSH Garrison ..... **221-0485/Bldg. 134, Second Floor**
FIFTH ARMY/ARNORTH ..... **221-1515/Bldg. 44, Suite 200**
BAMC ..... **916-2031/Bldg. 3600, Fifth Floor**
USARSO ..... **295-6227/Bldg. 1000, Room 612**
5th RECRUITING BRIGADE **221-0155/Bldg. 2007**

POST-GOVERNMENT EMPLOYMENT LETTER. You may request a Post-Government Employment letter by completing the Post-Government Employment Questionnaire in Appendix D and submitting it to your Ethics Counselor.

ATTORNEY-CLIENT PRIVILEGE. Employees should know that, when they are seeking advice on the job hunting and post-government employment rules from an Ethics Counselor, their communications to and from the Ethics Counselor are **not** protected by the attorney-client privilege.

PERSONAL ADVICE. In DOD, counseling and advice given to an employee on job hunting and post-government employment questions is considered to be personal legal advice to the employee. It may not be considered as legal advice to a prospective employer, or to any other company or non-Federal organization.

AMEDDC&S SJA ETHICS WEBSITE. The AMEDDC&S SJA maintains an Ethics website at http://www.samhouston.army.mil/sja/ethics.asp which contains information on a variety of ethics issues and links to other ethics websites.

II. RULES FOR FEDERAL EMPLOYEES ON SEEKING EMPLOYMENT

A. The financial interest rule. [18 USC §208; 5 CFR 2635.604]

Note: The rules discussed below are stated in terms of seeking employment with a company. However, the rules apply equally to seeking employment with other organizations (such as universities, non-profits, etc).

1. Basic rule. The Executive Branch ethics regulation (Standards of Ethical Conduct for the Executive Branch located at 5 CFR 2635) states that an "employee shall not participate personally and substantially in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom he is seeking employment...." The definitions concerning this rule are found in 5 CFR 2635.603.

2. If an employee has duties involving a company. If an employee is seeking employment from a company, the employee may not participate personally and substantially (through decision, approval, disapproval, recommendation, advice, investigation or otherwise) in any particular matter (e.g., contract, source selection, claim, sale of asset) in which the company has a financial interest. If an employee has duties involving a company, and he or she wants to seek employment with the company, the employee must be disqualified from such duties **before** he or she begins to seek employment with the company (i.e., before he or she sends the resume or has the first employment discussion). The disqualification must be in writing. A format for a Disqualification Letter is located at Appendix A to this pamphlet. Note that an employee's agency is not required to approve the request for disqualification from duties. A disqualification letter can disqualify an employee from duties involving one company, or many companies. Also, an employee may want to notify his or her coworkers that he or she is prohibited from working on matters involving the company, so that they will not ask the employee to work on such matters.

3. Personal and substantial participation. When an employee is in the process of seeking employment with a company, the employee may not participate personally and substantially in any particular matter in which the company has a financial interest. When people are told they may not "participate personally and substantially" in a matter, they often think they are only prohibited from making decisions on the matter. This is incorrect; the prohibition is much broader than that. "Personal and substantial participation" in a particular government matter includes the following:

- -- Making decisions regarding the matter,
- -- Giving advice to others about the matter,
- -- Making recommendations to others about the matter,
- -- Giving an approval or disapproval regarding the matter,
- -- Conducting evaluations regarding the matter,
- -- Assigning work or taskings to others in connection with the matter, or
- -- Participating in an investigation regarding the matter. [See 5 CFR 2635.603(d)]

4. If an employee does not have duties involving a company. If an employee wants to seek employment with a company, and he or she does not have any duties involving the company, the employee is not required to submit a Disqualification Letter. However, once the employee begins to seek employment with the company, he or she will be prohibited from participating personally and substantially in any particular government matter in which the company has a financial interest. Also, an employee may want to notify his or her coworkers that he or she may not work on matters involving the company, so they will not ask him or her to work on such matters.

5. Termination of disqualification. If an employee's employment discussions with a company do not lead to an employment arrangement, his or her disqualification from duties involving the company can be terminated. However, the employee's supervisor has the right to determine that, for appearance purposes, the employee should not immediately resume duties involving a company with which the employee was recently having employment discussions. If an employee was disqualified from duties involving a company, but never actually sought employment with the company, the employee may end the disqualification and resume duties involving the company at any time. However, if the employee was disqualified from duties involving a company, and he or she did seek employment with the company (by having discussions or submitting a resume), the employee may not end the disqualification and resume duties involving the company unless: (1) either the employee or the company has rejected the possibility of employment and all employment discussions have ended, or (2) two months have passed since the employee sent an unsolicited resume or employment proposal to the company, and he or she has received no indication of interest from the company.

6. Employment search firms. An employee may use an employment search (i.e., headhunter) firm when seeking post-government employment. An employment search firm may contact on the employee's behalf companies that have no relation to the employee's government duties. An employment search firm may also contact, on an employee's behalf, a company where the employee *is* participating in a government matter that affects the company's financial interests, as long as the employment search firm does not inform the employee that it has contacted the company (and assuming that the employee has not asked the employment search firm to contact that company). Once the employment search firm informs the employee that it has contacted the company on the employee's behalf, the employee is considered to be "seeking employment" with the company, and the employee may not participate personally and substantially in any government matter that affects the company's financial interests.

7. Different divisions of the same company. Employees sometimes ask if they may participate in a particular government matter that involves one division of a company while they are seeking employment with a different division of the same company. This is not permitted. If an employee is participating personally and substantially in a particular government matter in which any division of a company has a financial interest, then the employee is prohibited from seeking employment with any division of the company.

8. Approved retirement date. Soldiers are not required to have an approved retirement or separation date, or to have applied for retirement or separation, before beginning to seek employment.

9. OGE memo. On 20 September 2004, the Office of Government Ethics (OGE) issued a nine-page memo entitled "Seeking Employment." The memo summarizes the rules on this subject and is available at: http://www.usoge.gov/pages/daeograms/dgr_files/2004/do04029.pdf.

10. Enlisted Soldiers. The rules in this section are from 5 CFR Part 2635, the Standards of Conduct for Executive Branch employees. 5 CFR Part 2635 states that it applies to Federal civilian employees and to commissioned military officers, but not to enlisted Soldiers. [See 5 CFR 2635.102(h)] However, DoD Directive 5500.7, Standards of Conduct, 30 August 1993, para. 2.2.1 makes the rules in Part 2635 applicable to enlisted Soldiers. Paragraph 2.2.1 states:

> Although OGE regulations, reprinted in [the Joint Ethics Regulation], do not apply to enlisted Soldiers of the Department of Defense, the provisions of 5 C.F.R. 2634 (reference (m)), 5 C.F.R. 2635 (reference (n)), 5 C.F.R. 2638 (reference (q)), and 5 C.F.R. 2641 (reference (r)) are determined to be appropriate for enlisted Soldiers and are hereby made applicable to enlisted Soldiers as if the terms "employee" and "special Government employee," as used in those OGE regulations, include enlisted Soldiers to the same extent that military officers are included within the meaning of those terms.

Thus, the rules on seeking employment discussion in this section also apply to enlisted Soldiers.

B. The employment contact reporting rule. [41 USC §423(c)]

1. If a Federal employee who is participating personally and substantially in a procurement in excess of $100,000 (the simplified acquisition threshold) contacts, or is contacted by, a bidder or offeror in that procurement regarding possible employment for that employee, the employee must promptly report the contact in writing to the employee's supervisor and to the designated agency ethics official (or designee), AND either (1) reject the possibility of employment, or (2) disqualify himself or herself from further personal and substantial participation in the procurement. Sample letters for either situation are found at Appendices B and C respectively.

2. The disqualification must continue until the agency has authorized the employee to resume participation in the procurement on the grounds that (1) the company that the employment contact was with is no longer a bidder or offeror in the procurement, or (2) all discussions between the employee and the company regarding possible employment have terminated without an agreement or arrangement for employment.

C. Reimbursement of interviewing expenses. [5 CFR 2635.204(e)(3)]

An employee may accept reimbursement from a prospective employer for meals, lodging, transportation, and other benefits in connection with bona fide employment discussions, as long as: (1) the employee does not have duties that can affect the interests of the prospective employer (if so, the employee must first become disqualified from performing duties involving the company), and (2) the benefits the employee receives are "customarily" provided by the

prospective employer to the people being interviewed (i.e., the benefits the employee receives are not more extravagant than those received by others competing for the position).

D. Ban on communicating inside information to a prospective employer. [JER 8-400b, 5 CFR 2635.703(a)]

Executive Branch employees are prohibited from using "non-public information" to further their own private interests, or the private interests of any other person, company or organization. This rule prohibits employees from disclosing non-public information to companies or other organizations with which they are seeking employment. In addition, in DoD there is a specific rule that DoD personnel may not communicate inside information to a prospective employer. See also 18 USC 1905 which prohibits the disclosure of confidential information.

E. Soldiers using permissive TDY for seeking employment. [AR 600-8-10]

Soldiers may be entitled to use permissive TDY (PTDY) for job or residence searches. It is not permissible to use PTDY that is authorized for a job search simply to work in a new job. Four categories of people are entitled to use permissive TDY for job or residence searches: voluntary separation incentive (VSI) separatees, special separation benefits (SSB) separatees, involuntary separatees, and retirees. Authorized PTDY may range from 10 to 30 days, see paragraph 5-35, AR 600-8-10.

F. Ban on participating in any particular matter in which a company has a financial interest, when you have an employment arrangement with the company. [5 CFR 2635.606(a), 18 USC §208(a)]

If an Executive Branch employee has an employment arrangement with a company, the employee is prohibited from participating, in his or her official capacity, in any government contract, source selection, or other particular government matter, in which the company has a financial interest.

G. Government Resources. [31 U.S.C. §1344, 5 C.F.R. 2635.704 & 2635.705, JER 2-301, DOD Manual 4525.8]

Except for authorized transition assistance benefits and other supervisor-approved instances, you may not use government resources in job hunting.

H. Letters of Recommendation. [5 C.F.R. 2635.702]

1. You may obtain a letter of recommendation from other government employees on official letterhead if (1) the letter is based on the employee's personal knowledge of your ability or

character and (2) either the employee has dealt with you in the course of his/her government employment or you are applying for Federal employment.

2. You may obtain a letter of recommendation from a DOD contractor employee as long as you do not use your government position to coerce or induce the person to write the letter.

III. RULES FOR SOLDIERS ON TRANSITION LEAVE

A. Approval of employment during transition leave. [5 CFR 2635.803; JER 2-206]

1. Employment during transition leave is considered off-duty employment. Executive Branch employees are still required to comply with the regulations of their Federal agency on off-duty employment. Soldiers and civilian healthcare practitioners must obtain prior written approval for off-duty employment. For MEDCOM personnel, see MEDCOM Regulation 600-3 for procedures. For AMEDDC&S personnel, see AMEDDC&S Regulation 600-10.

2. Soldiers and civilian employees who are required to file either an OGE Form 450, Confidential Financial Disclosure Report, or an SF 278, Public Financial Disclosure Report, and who wish to go to work for a "prohibited source" (e.g., a DoD contractor), must obtain the prior written approval of their Ethics Counselor. Depending on your military job, there may be other additional rules on off-duty employment.

B. The ban on representing a non-Federal entity before a Federal agency. [18 USC §§203 & 205; JER 5-401 & 5-403]

1. General rule. Commissioned military officers and Federal civilian employees are prohibited from representing non-Federal organizations before any Federal agency. **This rule applies to officers on transition leave.** For example, the former Chief of the Dental Clinic on-post retires and wants to go to work for the contractor providing contract dentists in the Dental Clinic. The Chief may go to work for the contractor after his official retirement, but may not begin work in the Dental Clinic (Government workplace) during transition leave. The rule does not apply to enlisted Soldiers.

2. Ministerial communications. There is a Department of Justice (DOJ) memorandum that discusses an exception to the representation ban for "ministerial communications." [Department of Justice Memorandum, Application of Federal Conflict-of-Interest Statutes to Federal Employees' Working With or For Non-Federal Entities That Do Business with the United States, January 27, 1994] The DOJ memo gives examples of actions that would and would not violate the representation ban. The memo reads, in relevant part, as follows.

> Examples of prohibited "representational-type activities" include: (1) signing agreements with the Department or any other federal agency; (2) signing reports, memoranda, grant or

other applications, letters, or other materials (beyond the mere exchange of purely factual information or the expression of a wholly-routine request not involving a potential controversy) intended for submission to any federal agency or tribunal; (3) signing tax returns for submission to the Internal Revenue Service; and (4) arguing or speaking (in the sense of *urging*, *advocating*, or *intending to influence*) to any other federal employee who is acting in his *official* capacity or before any federal agency or tribunal for or against the taking or non-taking of any action by the United States in connection with any matter involving the non-federal entity and the United States. [DOJ Memo, page 10, footnote 55, italics in original.]

Section 205(a)(2) does not proscribe communications on behalf of a non-federal entity that are entirely *ministerial* in nature. Some examples of such communications might be: (1) conveying purely factual information; (2) merely delivering or receiving materials or documents; (3) answering (*without* advocating for a particular position) direct requests for information; (4) making *wholly*-routine requests that do *not* involve any potential for any controversy, dispute, or divergence of views between the agency and the non-federal entity (such as a request to use a meeting room); or (5) signing a document that attests to the existence or non-existence of a given fact (such as a corporate secretary's attestation that a given signature is valid or that a given person is authorized to bind or sign for the non-federal entity). [DOJ Memo, page 10, footnote 58, italics in original.]

This DOJ memo is available at: http://afmcethics.wpafb.af.mil/updates/doj.htm.

3. Working in the government workplace. On 15 Feb 06, the DoD Standards of Conduct Office issued SOCO Advisory 06-02, which states the following in paragraph 1.

Working on Terminal [Transition] Leave.

Military officers working on transition leave (like all Federal employees) are prohibited by 18 USC §205 and 18 USC §203 from representing their new employer to the Government. This makes problematic the increasingly common practice of contractor personnel physically working in Government offices. We think the criminal statutes preclude a member from interacting or appearing in the Federal workplace as a contractor. Being present in Government offices on behalf of a contractor inherently is a representation. Of course, military officers on transition leave may begin work with the contractor, but only "behind the scenes" at a contractor office or otherwise away from the Government workplace. Enlisted Soldiers are not subject to 18 USC §§203 or 205.

4. On 24 Feb 06, the DoD Standards of Conduct Office issued SOCO Advisory 06-03, which has more guidance on this subject. Paragraph 5 of the Advisory states:

"Contractor on Terminal [Transition] Leave" Redux.

We received several inquiries and comments regarding the last SOCO Advisory's reminder that it is virtually impossible for military personnel on transition leave to work as a

contractor in the Federal workplace without improperly "representing" the contracting company in violation of 18 USC §205. Recent feedback confirmed our suspicion that the "contractor on terminal leave" scenario is the perfect ethics trap for the unwary. There are at least four reasons why people are surprised:

#1. Leaving Government and returning as a contractor doing the same job while on transition leave used to be a common practice (and still may be in some places.) It is permissible as long as the employee on transition leave is not interacting with Federal personnel. This, of course, is almost impossible to do if physically located in the Federal workplace.

#2 Generally, Federal personnel (including lawyers) are unaware of the prohibitions of 18 USC §§205 and 203, that prohibit Federal personnel (by definition does not include enlisted Soldiers) from acting as an agent for someone else before the Government. An employee acting within the scope of his duties is an agent for his employer.

#3 Even personnel who know of 18 USC §205, tend to forget that it still applies to those on transition leave.

#4 The old view that "merely performing a contract" is not a representation was shot down by OGE in their opinion 99 X 19. OGE later advised that their logic in that opinion also applies to 18 USC 203 and 205. Hence, an Intelligence Analyst, preparing a report under an XCorp Government contract, represents XCorp to the Government when he submits his report. Regardless of whether the report is accurate, timely, useful, responsive, understandable, and comprehensive, it is the representation that is prohibited according to OGE.

Bottom line: It is almost impossible for personnel on transition leave to be working for a contractor in the Federal workplace. If they can't work behind the scenes while on transition leave, we suggest that they advance their retirement date and sell back their leave, or delay starting work until after they actually retire.

C. Soldiers on transition leave working as Federal civilian employees. [5 USC §5534a; JER 9-901a]

Soldiers may accept civilian employment with the Federal Government while on transition leave. If they do so, they are entitled to the pay of that civilian position and their military pay and allowances while on transition leave.

D. The ban on accepting a civil office with a State or local government while on transition leave. [10 USC §973(b)(3); JER 5-407 & 9-901b]

Commissioned military officers may not accept a civil office with a State or local government while on active duty. This rule also applies while the military officer is on transition leave. [See 56 Comp. Gen. 855 (1977)]

E. The ban on acting as a registered agent of a foreign government, person, or corporation. [18 USC §219; 5 CFR 2635.902q; JER 9-701c]

Federal employees are prohibited from being, or acting as, a registered agent of a foreign government, person, or corporation. This rule applies to military officers and enlisted Soldiers while on transition leave.

IV. POST-GOVERNMENT EMPLOYMENT RULES

A. The 1-year compensation ban. [41 USC §423(d)]

1. Who the ban applies to. The revised Procurement Integrity Act, which went into effect on 1 January 1997, contains a post-employment restriction called the "1-year compensation ban." The 1-year ban can apply to military officers, enlisted Soldiers, civilian employees, and special government employees. [FAR 3.104-1] It can apply regardless of whether one retires, resigns or separates from the government. Also, the ban can apply in connection with both competitively awarded contracts and non-competitively awarded (i.e., sole source) contracts. [FAR 3.104-3(d)(1)]

2. What is prohibited by the 1-year ban. The 1-year ban applies to accepting compensation as an employee, officer, director or consultant of the contractor. The ban does not apply to accepting compensation from any division or affiliate of a contractor that does not produce "the same or similar products or services" as the entity of the contractor that is responsible for the contract you were involved in (such as a commercial division of the contractor). [41 USC §423(d)(2)] The term "affiliate" means an associated business concern or individual if, directly or indirectly, either (a) one controls or can control the other, or (b) a third party controls or can control both. [See FAR 2.101] "Compensation" means wages, salaries, honoraria, commissions, professional fees, and any other form of compensation, provided directly or indirectly, for services rendered. Compensation is indirectly provided if it is paid to an entity other than the individual, specifically in exchange for services provided by the individual. [FAR 3.104-1]

3. Conduct resulting in the 1-year ban (the "seven plus seven rule"). The 1-year ban will apply to an employee if he or she serves in any of seven positions, or makes any of seven types of decisions, on a contract over $10 million. Specifically, the 1-year ban will apply if an employee does any of the following:

-- Serves as the Procuring Contracting Officer (PCO) on a contract over $10 million, at the time the contractor is selected for award or the contract is awarded.

-- Serves as the Source Selection Authority (SSA) on a contract over $10 million, at the time the contractor is selected for award or the contract is awarded.

-- Serves as a member of the Source Selection Evaluation Board (SSEB) on a contract over $10 million, at the time the contractor is selected for award or the contract is awarded.

-- Serves as the chief of a financial or technical evaluation team on a contract over $10 million, at the time the contractor is selected for award or the contract is awarded.

-- Serves as the Program Manager on a contract over $10 million.

-- Serves as the Deputy Program Manager on a contract over $10 million.

-- Serves as the Administrative Contracting Officer on a contract over $10 million.

The 1-year ban also applies to anyone who personally makes any of the following decisions:

-- Decision to award a contract over $10 million.

-- Decision to award a subcontract over $10 million.

-- Decision to award a modification over $10 million of a contract, or a modification over $10 million of a subcontract.

-- Decision to award a task order or delivery order over $10 million.

-- Decision to establish overhead or other rates applicable to a contract or contracts that are valued over $10 million.

-- Decision to approve issuance of a contract payment or payments over $10 million.

-- Decision to pay or settle a contract claim over $10 million.

4. Source selection evaluation boards. The term "source selection evaluation board" means any board, team, council, or other group that evaluates bids or proposals. [FAR 3.104-1]

5. Contracts over $10 million. Whether a contract is over $10 million is generally determined at the time of contract award. [FAR 3.104-1] For example, if a contract is awarded for more than $10 million, serving in one of the seven positions or making one of the seven decisions for that contract will cause the 1-year compensation ban to apply, even if the contract is modified after contract award to an amount below $10 million. Likewise, if a contract is awarded for less than $10 million, serving in one of the seven positions or making one of the

seven decisions for the contract will not cause the 1-year ban to apply, even if the contract is modified after contract award to an amount above $10 million. Also, if a contract has options, then the value of all of the options is included when determining if the contract is over $10 million. [FAR 3.104-1]

6. When the 1-year ban begins to run. The 1-year compensation ban is different from every other post-government employment restriction in that it does not necessarily begin to run on the employee's date of retirement, separation or resignation. Rather, it begins to run as follows:

-- If the employee was serving as the PCO, the SSA, a member of the SSEB, or the chief of a financial or technical evaluation team, on a contract over $10 million, the ban begins to run on the date of contract award (unless the employee was serving in one of these positions on the date of contractor selection but not on the date of contract award, in which case the ban begins to run on the date of contractor selection).

-- If the employee served as the Program Manager, Deputy Program Manager, or Administrative Contracting Officer, on a contact over $10 million, the ban begins to run on the last date the employee served in that position.

-- If the employee made one of the seven types of decisions listed above on a contract over $10 million, the ban begins to run on the date the decision was made. [FAR 3.104-3(d)]

Thus, if an employee was the Program Manager on a contract over $10 million, and he or she stopped serving in that position 14 months before retirement, the employee would be subject to the 1-year compensation ban, but the 1-year period would end before the employee retired. Likewise, if an employee makes one of the seven types of decisions listed above on a contract over $10 million, and does so six months before he or she retires, the employee will be subject to the 1-year ban, but the ban will end six months after the employee retires.

7. Requesting a legal opinion. Current and former employees may request a legal opinion on whether the 1-year compensation ban applies to them with regard to any company. [41 USC §423(d)(5)] The legal opinion is sometimes called a "safe harbor" letter. A request for a legal opinion must be in writing, dated and signed. [FAR 3.104-6(b)] If a request for a legal opinion does not contain all the necessary information, the 30 days for issuing the letter will not begin to run until all the necessary information has been submitted. Individuals may submit a request for a legal opinion either before or after they leave government service. Employees are not required to have their legal opinion in hand before they begin to talk to a company about a possible job. However, it is wise to have the legal opinion in hand before one begins to accept compensation from (i.e., go to work for) the company.

8. Good faith reliance. If an individual provides complete and accurate information when he or she requests a legal opinion, the legal opinion will serve as a protection for both the individual and his or her new employer (i.e., the contractor) from any later allegations that the 1-year compensation ban **does** in fact apply to the individual and the contractor. However, if the individual or the contractor has "actual knowledge" or "reason to believe" that the legal opinion

is based upon fraudulent, misleading, or otherwise incorrect information, then the legal opinion will not serve as protection for the individual or the contractor. [FAR 3.104-6(d)(3)]

9. Guidance from SOCO. The DoD Standards of Conduct Office has issued two memos that provide guidance on the one-year compensation ban. On 28 August 1998, that office issued a 5-page memo entitled "Guidance on Application of the Procurement Integrity Law and Regulation." It is at:
http://www.defenselink.mil/dodgc/defense_ethics/dod_oge/procinteglaw.htm.

On 10 August 1999, that office issued a two-page memo entitled "Guidance on Application of Procurement Integrity Compensation Ban to Program Managers." This memo is available on the web at: http://www.defenselink.mil/dodgc/defense_ethics/dod_oge/guidanceprocure.htm.

B. The lifetime representation ban. [18 USC §207(a)(1)]

1. Basic rule. A commissioned military officer or an Executive Branch civilian employee who has, in his or her official capacity, participated personally and substantially in a government contract or other particular matter, which involved a specific party or parties (such as a contractor) at the time of such participation, may not, at any time thereafter, knowingly make any communication to or appearance before any officer or employee of the United States, with the intent to influence such officer or employee, in connection with such government contract or other particular matter, on behalf of any person other than the United States. The law does not apply to enlisted Soldiers. The purpose of this rule is to keep individuals from "switching sides" and representing a company or other party in a particular matter on which they worked personally and substantially while in the government.

2. Elements. The "lifetime representation ban" can be summarized as follows. You will violate this law if all of the following conditions occur:

-- You are a military officer or a civilian employee in the Executive Branch;

-- While you are working for the Federal government, you **participate personally and substantially** in a government contract or other particular matter in which the United States has a direct and substantial interest;

-- At the time you participate in the contract or other matter there is another party (such as a government contractor) involved in the matter;

-- You leave the Federal government;

-- You then, at any time in your life, communicate with or appear before a Federal employee in connection with the same contract or other particular matter that you participated in while you were with the Federal government;

-- Your communication or appearance is on behalf of someone other than the United States (such as the contractor) (and the party on whose behalf you are making the appearance or communication does not have to be the same party who was involved in the matter at the time you were working on the matter for the government);

-- Your intent in making the communication or appearance is to **influence** the government official (i.e., you're not just providing information; you're trying to persuade the government official about something); and

-- You **know**, when you are communicating with or appearing before the government official, that the matter in question is a matter you participated in when you were with the government (i.e., it's not something so minor that you forgot you ever worked on it when you were with the government).

3. OGE summary. On 29 July 2004, the Office of Government Ethics issued a 14-page document entitled "Summary of the Post-Employment Restrictions of 18 U.S.C. §207." This document is available at: http://www.usoge.gov/pages/daeograms/dgr_files/2004/do04023a.pdf.

The summary, at pages 3-4, provides the following discussion of the lifetime representation ban:

> This is a lifetime restriction that commences upon an employee's termination from Government service. The target of this provision is the former employee who participates in a matter while employed by the Government and who later "switches sides" by representing another person on the same matter before the United States.
>
> The restriction does not apply unless a former employee communicates to or makes an appearance before the United States on behalf of some other person. For these purposes, the "United States" refers to any employee of any department, agency, court, or court-martial of the United States (but not of the District of Columbia). The term does not include the Congress, and therefore communications to or appearances before Members of Congress and legislative staff are not prohibited by this provision.
>
> A former employee is not prohibited by this restriction from providing "behind-the-scenes" assistance in connection with the representation of another person. Moreover, the restriction prohibits only those communications and appearances that are made "with the intent to influence." A "communication" can be made orally, in writing, or through electronic transmission. An "appearance" extends to a former employee's mere physical presence at a proceeding when the circumstances make it clear that his attendance is intended to influence the United States. An "intent to influence" the United States may be found if the communication or appearance is made for the purpose of seeking a discretionary Government ruling, benefit, approval, or other action, or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the particular Government action to be taken. Accordingly, the prohibition does not apply to an appearance or

communication involving purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.

A communication to or appearance before the United States is not prohibited unless it concerns the same particular matter involving a specific party or parties in which the former employee participated personally and substantially while employed by the Government. An employee can participate "personally" in a matter even though he merely directs a subordinate's participation. He participates "substantially" if his involvement is of significance to the matter. Thus, while a series of peripheral involvements may be insubstantial, participation in a single critical step may be substantial. The term "particular matter" includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding. In determining whether two situations are part of the same particular matter, one should consider all relevant factors, including the amount of time elapsed and the extent to which the matters involve the same basic facts or issues and the same or related parties. Even if a post-employment communication or appearance would concern the same particular matter, however, the representational bar will not apply unless the United States is a party or has a direct and substantial interest in that matter at the time of the post-employment representation.

4. Matters involving a specific party. The ban will apply only if an employee participates in the particular matter *after* a specific party other than the government (i.e., a private person or company) becomes involved in the matter. Employees sometimes believe that if they were only involved in a government contract before the contract was awarded, the ban does not apply (since there was no specific party involved in the matter until the contract was awarded). This is incorrect. For purposes of the lifetime representation ban, a specific party becomes "involved" in a government contract on the day that the Federal agency (normally the contracting office) receives the first written or verbal expression of interest in the contract from any company. [See 5 CFR 2637.201(c)(2)(Ex. 2)] This expression of interest could be a response to the Sources Sought Synopsis that was published in the Commerce Business Daily, a request for the draft Request for Proposals (RFP), or a letter requesting clarification of the statement of work in the RFP.

Thus, a government contract normally has a specific party or parties "involved" in it before the date when bids or proposals must be submitted, and well before contract award. Every government contract has an "outside party involvement date," i.e., the date when a non-Federal party first became involved in the contract. One often must dig into the Contracting Officer's file to ascertain this date. However, this date can be critical because if all of an employee's involvement in the procurement was before this date, the lifetime representation ban will not apply. On the other hand, if one looks at an employee's involvement after this date, and one determines that it was "personal and substantial," then the ban *will* apply.

5. Working for a support contractor and providing advice to the government. On 29 October 1999, the Office of Government Ethics (OGE) issued an opinion entitled "OGE Informal Advisory Opinion 99 X 19." This case involves a government employee who was the

contracting officer on a 70 million dollar construction contract. The contractor filed a large volume of claims against the government in connection with the contract. The contracting officer retired from government service. Since the contracting officer had participated personally and substantially in the construction contract, the lifetime representation ban applied to her regarding the contract. The government agency that had the construction contract also had a contract with a consulting company for technical support of the litigation involving the construction contract.

The former contracting officer did not want to go to work for the contractor that had been awarded the construction contract and that had filed the claims. Rather, she wanted to go to work for the consulting company and then help the government resolve the claims. The former contracting officer asked the OGE if she would violate the lifetime representation ban if she went to work for the litigation support contractor and gave advice to the government in an effort to help resolve the contract claims. She contended that, in making these communications to the government, she would be acting on behalf of the government, and as a result, her communications would not violate the lifetime representation ban. However, the OGE stated that "any communications and appearances she would be required to make to the Government would also be made to advance her employer's business interests arising from its consulting contract with [the agency]. For this reason, we cannot say that [the former employee] shares an identity of interests with [the agency] or that her 'sole function' as an employee of [the consulting company] would be to support [the agency's] interest in the contract claims."

The OGE concluded that the proposed employment by the former contracting officer would violate the lifetime representation ban. The consequence of 99 X 19 opinion is that government agencies will sometimes be precluded by the ban from obtaining assistance from former government employees who leave government service and take with them valuable knowledge and experience. As a result of this opinion, if the lifetime representation ban applies to a former government employee regarding a particular government matter, the individual will be prohibited from giving advice to the government regarding that matter, even if he or she would be doing so as an employee of a support contractor. On 28 August 2003, OGE issued Informal Advisory Opinion 03 X 06, in which it reaffirmed the position it took in its 99 X 19 opinion. The 03 X 06 opinion is at: http://www.usoge.gov/pages/advisory_opinions/advop_files/2003/03x6.pdf

If you are interested in working for a support contractor, a determination should be made (1) whether you participated personally and substantially in the support contract, and (2) whether you participated personally and substantially in the contract for which the support contractor is providing support.

6. Follow-on contracts. Normally, a government contract is considered to be a "particular matter." If an employee participates personally and substantially in the contract, the lifetime representation ban will apply to the employee regarding that contract. However, it is possible for two contracts to be related in such a way that they are considered to be one "particular matter." In this situation, an employee can participate personally and substantially in only one of the contracts, but the ban will apply to both contracts. This is because the ban applies to the whole "particular matter," and both contracts are part of the same particular matter.

Two related contracts (such as an initial contract and a follow-on contract) may or may not be considered to be part of the same particular matter. In determining whether two contracts are part of the same particular matter, one should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest. [5 CFR 2637.201(c)(4)] The 29 July 2004 OGE memo on 18 USC 207 (see above) states the test somewhat differently: "In determining whether two situations are part of the same particular matter, one should consider all relevant factors, including the amount of time elapsed and the extent to which the matters involve the same basic facts or issues and the same or related parties."

7. Other points. The penalty for violating the lifetime representation ban is a civil penalty of up to $50,000 and up to five years imprisonment. [18 USC 216] The ban does not prevent one from giving testimony under oath, or from making statements required to be made under penalty of perjury. However, there are special rules for giving expert testimony. [18 USC 207(j)(6)]

C. The 2-year representation ban. [18 USC §207(a)(2)]

1. Basic rule. A commissioned military officer or an Executive Branch civilian employee who has a government contract or other particular matter actually pending under his or her official responsibility during the one-year period before the termination of his or her government service, which involved a specific party or parties (such as a contractor) at the time it was so pending, may not, for two years after the termination of his or her government service, knowingly make any communication to or appearance before any officer or employee of the United States, with the intent to influence such officer or employee, in connection with such government contract or other particular matter, on behalf of any person other than the United States. The law does not apply to enlisted Soldiers.

2. Elements. The "2-year representation ban" can be summarized as follows. You will violate this law if all of the following eight conditions occur:

-- You are a military officer or a civilian employee in the Executive Branch;

-- While you're working for the government there is a government contract, or other particular matter in which the United States has a direct and substantial interest, that is pending **under your official responsibility during your last year in the government**;

-- At the time the matter is pending under your official responsibility during your last year in the government, there is another party (such as a contractor) involved in the matter;

-- You leave the Federal government;

-- During the first two years after you leave the government, you communicate with or appear before a Federal employee regarding the same contract or other particular matter;

-- Your communication or appearance is on behalf of someone other than the United States (such as the contractor) (and the party on whose behalf you are making the appearance or communication does not have to be the same party who was involved in the matter at the time the matter was pending under your official responsibility during your last year in the government);

-- Your intent in making the communication or appearance is to **influence** the government official (i.e., you're trying to persuade the government official about something); and

-- You **know**, when you are communicating with or appearing before the government official, that the matter in question is one that was pending under your official responsibility during your last year in the government (it's not something so minor that you did not know, or you forgot, that it was under your official responsibility during your last year in the government).

3. OGE summary. On 29 July 2004, the Office of Government Ethics issued a 14-page document entitled "Summary of the Post-Employment Restrictions of 18 U.S.C. §207." The summary, at pages 5-6, provides the following discussion of the two-year representation ban:

> This is a two-year restriction that commences upon an employee's termination from Government service.
>
> This provision is identical to the lifetime restriction discussed above except that it is of shorter duration and requires only that an individual have had official responsibility for a matter while employed by the Government, not that he have participated personally and substantially in that matter. Like the lifetime restriction, it prohibits certain communications and appearances made on behalf of any other person or entity except the United States (or the Congress). The communications and appearances prohibited are those made, with the intent to influence, to or before any employee of a department, agency, court, or court-martial of the United States. The representational bar applies with respect to any particular matter involving a specific party or parties that was actually pending under the former employee's official responsibility at some time during his last year of Government service.
>
> "Official responsibility" is defined in 18 U.S.C. §202 as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." The scope of an employee's official responsibility is usually determined by those areas assigned by statute, regulation, executive order, or job description. All particular matters under consideration in an agency are under the official responsibility of the agency head, and each is under that of any intermediate supervisor having responsibility for the activities of a subordinate employee who actually participates in the matter. An employee's recusal from or other non-participation in a matter does not remove it from his official responsibility.
>
> A matter was "actually pending" under a former employee's official responsibility if the matter was in fact referred to or under consideration by persons within the employee's area of responsibility. A former employee is not subject to the restriction, however, unless at the

time of the proposed representation of another he knows or reasonably should know that the matter had been under his official responsibility during his last year of Government service.

4. Definitions. The terms "particular matter," "communication," "appearance," and "intent to influence" have the same definition for the 2-year representation ban as they have for the lifetime representation ban (see the preceding section).

5. Guidance under lifetime ban applies to 2-year ban. The preceding section, which deals with the lifetime representation ban, contains guidance on (1) matters involving a specific party or parties, (2) follow-on contracts, (3) working for a support contractor and providing advice to the government. This guidance also applies to the two-year representation ban.

6. Other points. The 2-year representation ban does not prevent an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury. [18 USC §207(j)(6)] The penalty for violating this law is a civil penalty of up to $50,000 and up to five years imprisonment.

D. The 1-year ban on aiding "the other side" in trade or treaty negotiations. [18 USC §207(b)]

For one year after leaving Federal service, commissioned military officers and Federal civilian employees are prohibited from knowingly representing, aiding, or advising any other person (except the United States) concerning any ongoing trade or treaty negotiations in which, during their last year of government service, they participated personally and substantially. This law does not apply to enlisted Soldiers. A violation may result in a civil penalty of up to $50,000 and up to five years in prison.

E. The 1-year no-contact rule. [18 USC §207(c)]

1. Basic rule. "Senior employees" may not, for one year after leaving their agency, make any communication to, or appearance before, any employee of their former agency (or the President or Vice President), with the intent to influence that person, on behalf of any third person, in connection with any matter on which the third person seeks official action by their former agency. This law is also called the one-year cooling-off rule. A violation may result in a civil penalty of up to $50,000 and up to five years in prison.

2. Senior employees. "Senior employee" includes General and Flag Officers. [18 USC §207(c)(2)(A)(iv)]. At this time the one-year no contact rule (i.e., 18 USC §207(c)) applies to flag and general officers, and civilian personnel whose basic rate of pay is at or above 86.5 percent of the basic rate for Executive Schedule Level II (i.e., at or above $142,898.00 in CY 2006). On 22 November 2005, the Office of Personnel Management (OPM) issued a two-page memo on the applicability of 18 USC §207(c) to civilian employees. The memo is on the OPM website at: http://www.opm.gov/oca/compmemo/2005/2005-21.asp.

The one-year no contact rule can also apply to "special government employees" (including reserve general and flag officers) under certain conditions. [See 18 USC §207(c)(2)(B)] On 9 February 2006, the Air Force General Counsel's Office issued a two-page document entitled "Talking Paper on Post-Employment Rules for Reservists." The document discusses the application of the one-year no contact rule to reserve general officers and is available on the website of the Air Force General Counsel's Office.

3. OGE summary. On 29 July 2004, the Office of Government Ethics issued a 14-page document entitled "Summary of the Post-Employment Restrictions of 18 U.S.C. §207." The summary, at pages 8-9, provides the following discussion of the one-year no contact rule.

> 4. Basic Prohibition of 18 U.S.C. §207(c). For one year after service in a "senior" position terminates, no former "senior" employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of a department or agency in which he served in any capacity during the one-year period prior to termination from "senior" service, if that communication or appearance is made on behalf of any other person (except the United States), in connection with any matter concerning which he seeks official action by that employee.
>
> This is a one-year restriction. The one-year period is measured from the date when an employee ceases to be a senior employee, not from the termination of Government service, unless the two occur simultaneously. The purpose of this one-year "cooling off" period is to allow for a period of adjustment to new roles for the former senior employee and the agency he served, and to diminish any appearance that Government decisions might be affected by the improper use by an individual of his former senior position. As already noted, this provision is applicable to "senior" employees, but not to "very senior" employees.
>
> Like the lifetime restriction discussed above, this provision prohibits communications to and appearances before the Government and does not prohibit "behind-the-scenes" assistance. Unlike the lifetime restriction, however, this one-year restriction applies only to a "senior" employee, does not require that the former employee have ever been in any way involved in the matter that is the subject of the communication or appearance, and only prohibits communications to or appearances before employees of any department or agency in which he formerly served in any capacity during the one-year period prior to his termination from senior service. The representational bar applies with respect to any matter, whether or not involving a specific party, concerning which the former senior employee is seeking official action by a current employee of such department or agency on behalf of any other person except the United States (or the Congress).
>
> As described below, section 207 provides for two methods by which the restrictions of section 207(c) can be narrowed or eliminated. The first is through the designation of separate departmental or agency components and the second is through the exemption of a position or category of positions from coverage. Not all senior employees are eligible to benefit from either or both of these procedures. A former senior employee is ineligible to benefit from these procedures if he is subject to section 207(c) by virtue of having served in

a position for which the rate of pay is specified in or fixed according to the Executive Schedule or by virtue of having been appointed by the President to a position under 3 U.S.C. §105(a)(2)(B) or by the Vice President to a position under 3 U.S.C. §106(a)(1)(B). A former senior employee who is subject to section 207(c) by virtue of having been assigned by a private sector organization to an agency under the Information Technology Exchange Program, 5 U.S.C., chapter 37, is eligible to benefit from the component designation procedure but not from the position exemption procedure.

As has been noted, the representational bar usually extends to any department or agency in which the former senior employee served in any capacity during the year prior to his termination from senior service. However, certain senior employees may be permitted to communicate to or appear before components of their former department or agency if those components have been designated as separate agencies or bureaus by OGE. For example, although it may not by statute be a separate component, OGE has designated the Defense Logistics Agency as an agency that exercises functions which are separate and distinct from its "parent" department, the Department of Defense. For a list of other designations of separate agencies, see appendix B to 5 C.F.R. part 2641. An individual formerly serving in a parent department or agency would be barred by section 207(c) from making communications to or appearances before any employee of that parent, but would not be barred as to employees of any designated component of that parent. An individual formerly serving in a designated component of a parent department or agency would be barred from communicating to or appearing before any employee of that component, but would not be barred as to any employee of the parent or of any other component. The statute now provides that no agency within the Executive Office of the President may be designated as a separate component.

4. Separate component designations. Ten "components" within DoD have been designated as "separate" components under this rule. This means that for a "senior employee" employed by one of these ten components, the rule prohibits communications with and appearances before employees of that component, but does not prohibit communications with or appearances before employees of any other part of DoD. The ten components are:

Department of the Air Force
Department of the Army
Department of the Navy
Defense Information Systems Agency
Defense Intelligence Agency
Defense Logistics Agency
Defense Threat Reduction Agency (effective 2-5-99)
National Geospatial-Intelligence Agency (formerly National Imagery & Mapping Agency) (effective 5-16-97)
National Reconnaissance Office (effective 1-30-03)
National Security Agency

[Federal Register, Volume 69, pages 68053-68056, 23 November 2004] For example, for an Army general officer, the ban applies to communicating with or appearing before employees of the Army, but not employees of any other part of DoD (except as discussed in the next paragraph).

5. General/Flag Officers with last assignment in a DoD agency. If a general/flag officer has a final assignment in a DoD agency (e.g., DLA, DIA), the one-year no contact rule applies to representation before that DoD agency and his or her Military Department. Generals and Admirals, who retire from agencies other than their respective military services, are considered to have been detailed to those agencies, and they are prohibited by 207(c) from communicating back to personnel of both their agency and their military service. (See 18 U.S.C. §207(h)). Thus, if an Air Force General were assigned to the Defense Logistics Agency (DLA), the one-year bar would apply to the General, and would prevent him from communicating back to Air Force and to DLA.

6. Behind-the-scenes assistance. The one-year no contact rule does not prohibit individuals from providing "behind-the-scenes" assistance. On 19 January 2001, the Office of Legal Counsel of the Department of Justice issued an opinion that adds complexity to the behind-the-scenes exception. [Memorandum for Amy L. Comstock, Director, OGE, from Joseph R. Guerra, Deputy Assistant Attorney General, OLC, January 19, 2001] This opinion established the following principle:

> [A] former employee does not confine herself to permissible behind-the-scenes activity when she conveys information to the Government through an intermediary and does so with the intent that the information be attributed to her.

The opinion is available at: http://www.usdoj.gov/olc/207cfinal.htm.

7. Exception for employees of colleges or universities. On 29 July 2004, the Office of Government Ethics issued a 14-page document entitled "Summary of the Post-Employment Restrictions of 18 U.S.C. §207." The summary, at pages 12-13, states:

> Representing Certain Entities A former senior or very senior employee will not violate section 207(c) or (d) if his communication or appearance is made in carrying out official duties as an employee of and is made on behalf of (1) an agency or instrumentality of a State or local Government, (2) an accredited degree-granting institution of higher education as defined in section 101 of the Higher Education Act of 1965, as amended (20 U.S.C. §1001), or (3) a hospital or medical research organization exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. §501(c)(3)).

8. Other points. The one-year no contact rule does not prevent a former government employee from giving testimony under oath, or from making statements required to be made under penalty of perjury. However, if the former government employee participated personally and substantially in a particular matter, he or she may not serve as an expert witness in that matter for any person except the United States, except pursuant to a court order. [18 USC

§207(j)(6)] A violation may result in a civil penalty of up to $50,000 and up to five years in prison.

F. The 1-year ban on assisting foreign entities. [18 USC §207(f)]

1. Basic rule. "Senior employees" may not, for one year after leaving Federal service, engage in two types of conduct. First, they may not represent a foreign government or foreign political party before any officer or employee of any department or agency of the United States, with the intent to influence a decision of such officer or employee in carrying out his or her official duties. Second, they may not aid or advise a foreign government or foreign political party with the intent to influence a decision by any officer or employee of any department or agency of the United States, in carrying out his or her official duties.

2. Senior employee. "Senior employee" has the same definition as for the "one-year no-contact rule." The one-year ban on assisting foreign entities can also apply to "special government employees" (including reserve general and flag officers) under certain conditions. [See 18 USC §207(c)(2)(B)] On 9 February 2006, the Air Force General Counsel's Office issued a two-page document entitled "Talking Paper on Post-Employment Rules for Reservists." The document discusses the application of the 1-year ban on assisting foreign entities to reserve general officers and is on the website of the Air Force General Counsel's Office.

3. OGE summary. On 29 July 2004, the Office of Government Ethics issued a 14-page document entitled "Summary of the Post-Employment Restrictions of 18 U.S.C. §207." The summary, at pages 10-12, provides the following discussion of the one-year ban on assisting foreign entities.

> Basic Prohibition of 18 U.S.C. §207(f). For one year after his service in a "senior" or "very senior" position terminates, no former "senior" employee or former "very senior" employee may knowingly, with the intent to influence a decision of an employee of a department or agency of the United States in carrying out his official duties, represent a foreign entity before any department or agency of the United States or aid or advise a foreign entity.
>
> Discussion. This is a one-year restriction, except that it is permanent as applied to any individual who serves as the United States Trade Representative or Deputy United States Trade Representative. The restriction is measured from the date when an employee ceases to be a senior employee or a very senior employee, not from the termination of Government service, unless the two occur simultaneously.
>
> This restriction prohibits a former senior or very senior employee from representing, aiding, or advising a foreign entity with the intent to influence certain governmental officials. A "foreign entity" means the "government of a foreign country" as defined in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. §611), as amended, or a "foreign political party" as defined in section 1(f) of that Act. The government of a foreign country includes--

> any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States.

A foreign political party includes--

> any organization or any other combination of individuals in a country other than the United States, or any unit or branch thereof, having for an aim or purpose, or which is engaged in any activity devoted in whole or in part to, the establishment, administration, control, or acquisition of administration or control, of a government of a foreign country or a subdivision thereof, or the furtherance or influencing of the political or public interests, policies, or relations of a government of a foreign country or a subdivision thereof.

A foreign commercial corporation will not generally be considered a "foreign entity" for purposes of section 207(f) unless it exercises the functions of a sovereign.

A former senior or very senior employee "represents" a foreign entity when he acts as an agent or attorney for or otherwise communicates or makes an appearance on behalf of that entity to or before any employee of a department or agency. He "aids or advises" a foreign entity when he assists the entity other than by making such a communication or appearance. Such "behind the scenes" assistance to a foreign entity could, for example, include drafting a proposed communication to an agency, advising on an appearance before a department, or consulting on other strategies designed to persuade departmental or agency decision makers to take certain action. A former senior or very senior employee's representation, aid, or advice is only prohibited if made or rendered with the intent to influence an official discretionary decision of a current departmental or agency employee.

4. Representation before Members of Congress. On 22 June 2004, the Department of Justice Office of Legal Counsel issued a five-page opinion which concludes that the one-year ban on assisting foreign entities prohibits representation before Members of Congress. The opinion is at: http://www.usoge.gov/pages/laws_regs_fedreg_stats/lrfs_files/othr_gdnc/olc_06_22_04.pdf.

5. Other points. The one-year ban on assisting foreign entities does not prevent an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury. [18 USC §207(j)(6)] The penalty for violating this rule is a civil penalty of up to $50,000 and up to five years imprisonment.

G. Nondisclosure of non-public information. [18 U.S.C. §§793, 794 & 1905]

You are prohibited from using or disclosing any non-public, proprietary, classified, financial, trade secret, or procurement-sensitive information.

H. 180-day waiting period on retired Soldiers taking a civilian position in DoD. [5 USC §3326]

5 USC §3326(b) states:

> (b) A retired member of the armed forces may be appointed to a position in the civil service in or under the Department of Defense (including a nonappropriated fund instrumentality under the jurisdiction of the armed forces) during the period of 180 days immediately after his retirement only if--
>
> (1) the proposed appointment is authorized by the Secretary concerned or his designee for the purpose, and, if the position is in the competitive service, after approval by the Office of Personnel Management;
>
> (2) the minimum rate of basic pay for the position has been increased under section 5305 of this title; or
>
> (3) a state of national emergency exists.

This statute is implemented by DoD Directive 1402.1, Employment of Retired Members of the Armed Forces, January 21, 1982 (Certified Current as of December 1, 2003). On the website of the DoD Standards of Conduct Office, there is a document dated 8 March 2006 and entitled "Post-Government Service Employment Restrictions (Rules Affecting Your New Job After DoD) -- For Military Personnel E-1 through O-6 and Civilian Personnel whose rate of basic pay is less than 86.5% of the rate for Executive Schedule Level II (less than $142,898 in 2006)." Paragraph 3.2 of this document states:

> 3.2 EMPLOYMENT BY DOD: To avoid the appearance of favoritism, 5 U.S.C. §3326 prohibits the appointment of retired Soldiers to civil service positions (including a nonappropriated fund activity) in any DoD component for 6 months after retirement. **(This restriction has been temporarily waived during the current national emergency following the attacks of 9/11).**

An 8 Sep 05 White House Press Release states that the President is continuing the state of national emergency for an additional year. The Press Release is available at: http://www.whitehouse.gov/news/releases/2005/09/print/20050908-10.html.

Thus, the 180-day waiting period is currently waived given the current period of national emergency.

I. Employment of retired Soldiers by a foreign government. [37 USC §908]

General rule. JER 9-701a & b read as follows:

9-701. Foreign Employment Restrictions

a. Article I, Section 9, Clause 8, of the Constitution of the United States (reference (j)), prohibits any person holding any office of profit or trust under the Federal Government from accepting any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state without the consent of Congress.

(1) This provision prohibits employment of all retired Soldiers, both officer and enlisted and both Regular and Reserve, by a foreign government unless Congressional consent is first granted. See 44 Comp. Gen. 130 (reference (k)).

(2) Employment by educational or commercial institutions owned, operated, or controlled by a foreign government is included within the scope of this restriction.

(3) The penalty for violation is withholding the retired military member's retired pay in an amount equal to the foreign salary illegally received. See 61 Comp. Gen. 306....

b. Congress has consented to the acceptance of civil employment with a foreign government by, among others, retired Regular Soldiers and Reserve Soldiers, if both the Secretary of the Military Department and the Secretary of State approve the employment. See 37 U.S.C. §908 (reference (m)). Because approval is prospective only, foreign civil employment should not be accepted until approval has been obtained. Retired Soldiers who wish to accept such employment should submit a written request for approval to the Secretary of their Military Department through appropriate channels. The request must fully describe the contemplated employment and the nature and extent of the involvement with the foreign government.

J. Other foreign activities by retired Soldiers.

1. Foreign armed forces. Serving in the armed forces of a foreign government will result in loss of retired pay. [58 Comp. Gen. 566 (1979)] However, there is an exception for serving in the armed forces of certain newly democratic nations. [10 USC §1060]

2. Renouncing citizenship. Retired Soldiers who voluntarily renounce their U.S. citizenship will lose their retired pay. [58 Comp. Gen. 566 (1979); Comp. Gen. Dec. B-212481 (2 February 1984)] However, if you can hold dual citizenship, without renouncing your U.S. citizenship, you may be able to continue receiving retired pay. [Opinion of The Judge Advocate General of The Air Force (OpJAGAF) 1996/104, 20 June 1996]

3. Agent of a foreign government. Individuals, including former government employees, who would like to act as a representative of a foreign government or foreign entity may be

required to register as a foreign agent. 22 U.S.C. §611; 28 CFR Part 5. The Registration Unit, Criminal Division, Department of Justice, Washington, D.C. 20530, (202) 514-1216, can provide further information. Information is also available at: http://www.usdoj.gov/criminal/fara.

V. MISCELLANEOUS RULES

A. The requirement for departing senior employees to file an SF 278. [JER 7-203d]

General/flag officers, SES employees and SES-equivalent employees are required to complete a Public Financial Disclosure Report (SF 278) within 30 days after termination of Federal service (e.g., their retirement date). [JER 7-203d] With regard to Reserve officers, JER 7-203d states: "A termination report is not required of a Reserve military officer in the grade of O-7 or above who did not serve more than 60 days on active duty during the calendar year in which the military officer is transferred to the Retired Reserve."

B. Retired Soldiers using their military title. [JER 2-304]

Joint Ethics Regulation (DoD 5500.7-R), paragraph 2-304, states:

> Use of Military Title by Retirees or Reserves. Retired Soldiers and members of Reserve Components, not on active duty, may use military titles in connection with commercial enterprises, provided they clearly indicate their retired or inactive Reserve status. However, any use of military titles is prohibited if it in any way casts discredit on DoD or gives the appearance of sponsorship, sanction, endorsement, or approval by DoD. In addition, in overseas areas, commanders may further restrict the use of titles by retired Soldiers and members of Reserve Components.

C. Retired Soldiers wearing the uniform. [AR 670-1]

AR 670-1, Wear and Appearance of Army Uniforms and Insignia, 3 February 2005, paragraph 30-4 provides that former members of the Army may wear the uniform if they served honorably during a declared or undeclared war, and if their most recent service was terminated under honorable conditions. The service or dress uniform may be worn when attending military funerals, memorial services, weddings, inaugurals, and other occasions of ceremony. It may also be worn when attending parades on national or state holidays, or other patriotic parades or ceremonies in which any active or reserve United States military unit is taking part.

D. Going to work for a support contractor – participation by the departing employee in efforts to obtain services from the support contractor. [18 USC §208]

Sometimes a departing employee will want to go to work as an employee of a support contractor and then provide support to the government organization where he or she worked just before leaving government service. It is essential that the departing employee not participate in any actions by a government organization regarding the obtaining of services from a support contractor, if the departing employee would like to go to work for the support contractor and provide those services. This guidance results from the basic conflict-of-interest law that applies to Federal employees (18 USC §208), which is a criminal statute. This law provides that a Federal employee may not participate personally and substantially in any particular government matter in which he or she has a personal financial interest. If a government organization is going to obtain services from a support contractor, and a departing government employee is interested in going to work for the support contractor and personally providing those services, then the effort by the government organization to obtain those services from the support contractor is a particular government matter in which the departing employee has a personal financial interest.

As a result, the departing employee may not participate personally and substantially in the effort by the government organization to obtain those services from the support contractor. This means, for example, that the departing employee may not participate in discussions with other government employees regarding how best to obtain the services from the support contractor (i.e., planning and strategizing), may not draft or review the description of the services to be obtained, and may not give any advice, make any recommendations, or make any decisions concerning the effort. In short, the departing employee should have no part in the effort to obtain the services from the support contractor; he or she should be kept out of the process. Supervisors who have questions about how this rule applies in a given situation should request advice from their servicing ethics counselor.

E. Asking a support contractor to hire a departing employee. [5 CFR 2635.702; FAR 37.203]

There are two legal authorities that are relevant to the question of whether it is permissible for a supervisor to communicate to the support contractor a desire that it hire a particular departing employee. First, FAR 37.203(c) & (c)(3) state: "Advisory and assistance services shall not be... [c]ontracted for on a preferential basis to former Government employees." Second, the Executive Branch ethics regulation (5 CFR 2635.702 & 702(a)) states:

> Use of public office for private gain.
>
> An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. The specific prohibitions set forth

in paragraphs (a) through (d) of this section apply this general standard, but are not intended to be exclusive or to limit the application of this section.

(a) Inducement or coercion of benefits. An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.

These authorities make clear that it is not permissible for a supervisor to communicate to the support contractor a desire that it hire a particular departing employee.

F. Other pamphlets on the job hunting and post-government employment rules.

1. DoD Standards of Conduct Office document dated 8 March 2006 and entitled "Post-Government Service Employment Restrictions (Rules Affecting Your New Job After DoD) -- For Military Personnel E-1 through O-6 and Civilian Personnel whose rate of basic pay is less than 86.5% of the rate for Executive Schedule Level II (less than $142,898 in 2006)." This document is six pages long and is available at:

http://www.defenselink.mil/dodgc/defense_ethics/resource_library/Pgser_2006.doc.

2. DoD Standards of Conduct Office document dated 8 March 2006 and entitled "Post-Government Service Employment Restrictions -- For civilian personnel whose rate of basic pay is at or above 86.5% of the rate for Executive Schedule Level II (less than $142,898 in 2006) and Flag and General Officers." This document is seven pages long and is available at:

http://www.defenselink.mil/dodgc/defense_ethics/resource_library/Pgser_senior_2006.doc.

APPENDIX A

FORMAT FOR A DISQUALIFICATION LETTER

[Office Symbol] [Date]

MEMORANDUM FOR [Commander/supervisor]

SUBJECT: Request for Disqualification from Duties

1. My (approved) (contemplated) date of (retirement) (separation) (resignation) is ____. I contemplate entering into employment discussions prior to leaving Federal service. To avoid any possibility of a conflict of interest and to permit an orderly transition of responsibilities, request that I be excluded from, and relieved of, all matters and responsibilities regarding (name of company(ies) and/or organization(s)).

2. I will conduct all employment discussions [during leave or off-duty time (to be used by civilians & separating Soldiers)] [during leave, off-duty time, or permissive TDY (to be used by retiring Soldiers)].

3. [If you will have a subordinate screen matters to ensure that you are not given any official matters involving the companies or organizations that are the subject of this disqualification letter, you may, if you choose, include the following language in your disqualification letter:]

I am instructing [name of screener] that, if an official matter is directed to my attention that involves a company or organization listed in this disqualification letter, the matter should be referred to [name of employee] for action or assignment, without my knowledge or involvement. I will advise my immediate subordinates of this disqualification, and will instruct them to direct all inquiries regarding matters involving a company or organization listed in this disqualification letter to [name of employee], without my knowledge and involvement.

[Your Signature Block]

Copy Furnished:
Ethics Counselor
Individuals Named in the Memorandum

APPENDIX B

SAMPLE PROCUREMENT INTEGRITY CONTACT NOTICE AND REJECTION OF EMPLOYMENT

[Office Symbol] [Date]

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Notice of Non-Federal Employment Contact and Rejection of Employment

1. I (was contacted by/contacted) _____ concerning possible future employment. In accordance with Title 41, United States Code, Section 423(c) and Federal Acquisition Regulation (FAR) 3.104-4(c), I hereby provide written notice of this contact.

2. The firm has an interest in our agency's procurement of _____ _____ and I am an agency official participating as _____ in that procurement.

3. I reject the possibility of non-Federal employment with this firm. I wish to continue in my role as an agency official participating in the procurement.

Signature Block

Copy Furnished:
Supervisor
Ethics Counselor

NOTE: SUBJECT NOTICE IS REQUIRED PROMPTLY AFTER ANY CONTACT CONCERNING POSSIBLE NON-FEDERAL EMPLOYMENT WITH A PERSON OR FIRM BIDDING ON A PROCUREMENT IN EXCESS OF THE SIMPLIFIED ACQUISITION THRESHOLD.

APPENDIX C

SAMPLE PROCUREMENT INTEGRITY CONTACT NOTICE AND DISQUALIFICATION

[Office Symbol] [Date]

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Notice of Non-Federal Employment Contact and Disqualification for Purposes of Employment Discussions

1. I (was contacted by/contacted) _____ concerning possible future employment. In accordance with Title 41, United States Code, Section 423(c) and Federal Acquisition Regulation (FAR) 3.104-4(c), I hereby provide written notice of this contact.

2. I wish to engage in employment discussions with this firm. In accordance with FAR 3.104-4(c)(2)(ii), I am disqualifying myself from further participation in the following acquisition.

a. Name of procurement and solicitation number: _____.

b. To date, I have had the following involvement in this procurement:
_____
_____. This involvement occurred from _____ to _____.

c. The firm is a bidder/offeror with the following interest in the procurement:
_____
_____.

3. I acknowledge the agency's right to take appropriate administrative action under Title 5, Code of Federal Regulations, Section 2635.604(d) if my disqualification substantially interferes with my ability to perform my assigned duties. Nevertheless, to avoid any possibility of a conflict of interest and to permit an orderly transition of responsibilities, I request that I be excluded from, and relieved of, all matters and responsibilities regarding the _____ procurement.

4. I will conduct all employment discussions while on leave or during off-duty time.

Signature Block

Copy Furnished:
Supervisor
Ethics Counselor

NOTE: YOUR SUPERVISOR, IN CONSULTATION WITH OTHER GOVERNMENT OFFICIALS, MAY DETERMINE THAT YOUR DISQUALIFICATION PRECLUDES YOU FROM PERFORMING DUTIES THAT ARE ESSENTIAL TO YOUR CONTINUED FEDERAL EMPLOYMENT. YOU SHOULD CAREFULLY DISCUSS YOUR SITUATION WITH YOUR SUPERVISOR AND YOUR ETHICS COUNSELOR BEFORE SUBMITTING A DISQUALIFICATION MEMORANDUM.

APPENDIX D

POST-GOVERNMENT EMPLOYMENT QUESTIONNAIRE

The purpose of this questionnaire is to give your Ethics Counselor information needed for an opinion on the applicability of 41 U.S.C. §423 and other post-Government employment restrictions, such as 18 U.S.C. §207.

Title 41, U.S.C. §423, 48 C.F.R. §3.104-6, and 5 C.F.R. §2635.107 allow you to request a written agency ethics opinion on post-Government employment restrictions. However, if the information provided is incomplete or false, or if you fail to follow your Ethics Counselor's advice, you will not be immune from criminal prosecution or you may be subject to penalties imposed by the Procurement Integrity Act. Ethics advice is substantially dependent upon your information. Therefore, as circumstances change, you have a duty to inform the Ethics Counselor so he or she can determine if the advice originally given remains applicable to your situation. If you have changes to your employment information, you will need to inform the Ethics Counselor and you may want to submit a new questionnaire for a revised ethics opinion. Information must be legible. Explain all acronyms and/or technical information, including but not limited to program names, projects, or definitions.

NOTE: SUBMIT QUESTIONNAIRE TO THE ETHICS COUNSELOR AT YOUR LAST DUTY ASSIGNMENT

PRIVACY ACT STATEMENT

AUTHORITY: PRIVACY ACT OF 1974 (5 U.S.C. §552(A)(7)), 41 U.S.C. §423, 5 C.F.R. §2635.602, AR 340-21

PRINCIPAL USES: TO ENABLE ETHICS COUNSELORS TO RENDER ADVICE TO MILITARY AND CIVILIAN EMPLOYEES LEAVING GOVERNMENT SERVICE.

ROUTINE USES: INFORMATION PROVIDED IS NOT CONFIDENTIAL. THE ETHICS COUNSELOR IS THE GOVERNMENT'S REPRESENTATIVE. **THERE IS NO ATTORNEY/CLIENT RELATIONSHIP ESTABLISHED BETWEEN THE ETHICS COUNSELOR AND THE INDIVIDUAL, AND THE ETHICS COUNSELOR MAY NOT ACT AS AN ATTORNEY ON BEHALF OF ANYONE SUBMITTING THIS INFORMATION**. THE INFORMATION WILL BE USED FOR PROVIDING WRITTEN ETHICS ADVICE. IT WILL BE RETAINED FOR SIX YEARS AND WILL BE AVAILABLE TO ETHICS COUNSELORS, FINANCE PERSONNEL, AND OTHER APPROPRIATE PERSONNEL RESPONSIBLE FOR COMPLIANCE WITH POST-GOVERNMENT EMPLOYMENT RESTRICTIONS.

DISCLOSURE: VOLUNTARY. NO CRIMINAL, CIVIL OR OTHER PENALTIES WILL FOLLOW FROM REFUSAL TO PROVIDE REQUESTED INFORMATION. HOWEVER, FAILURE TO FULLY DISCLOSE INFORMATION REQUESTED COULD RESULT IN RECEIPT OF INCOMPLETE ADVICE OR THE INABILITY TO PROVIDE WRITTEN ETHICS ADVICE PURSUANT TO 41 U.S.C. §423.

I

PRIOR ETHICS ADVICE

1. Have you received any oral or written ethics advice from a Government Ethics Counselor, inside or outside of DoD, concerning your job search or prospective employment?

Yes____ No____

2. If "Yes" provide details. If written advice was previously given, attach a copy of that advice. This includes any emails that you may have received.

_____

_____

_____

II

BASIC INFORMATION

1. Name _____

2. Office Phone (____)_____

   Home Phone (____)_____

3. Home Address_____

_____

_____

4. Office Address_____

_____

5. Address to which you want your written ethics advice sent. Home _____ Office _____

6. Grade or Rank: _____

7. Retirement Date: _____

Transition (formerly Terminal) Leave Date: _____

8. During the last year have you filed an OGE 450, "CONFIDENTIAL FINANCIAL DISCLOSURE REPORT"? Yes ____ No ____

If "YES", for which job?

_____

_____

_____

Note: Seeking employment by you or someone acting on your behalf constitutes a financial interest in the companies in which you are seeking employment.

9. Have you issued a disqualification statement, naming the companies in which you are seeking employment, changed jobs or duties, or taken any other action to resolve a potential conflict of interest? Yes ____ No ____

If you have issued a disqualification memo, attach a copy of the disqualification memo. If you have not issued a disqualification memo, explain how you have avoided conflicts of interest, specifically including persons with whom you have communicated, dates of communications, and methods of communication.

_____

_____

_____

10. What is your current (or last) DoD assignment? Spell Out Acronyms

_____

_____

_____

_____

11. Attach your OER support form or job description and describe your duties, focusing on duties relating to defense contracts, acquisitions, or functions related to contract management (include names of programs and contractors involved). For those who are not in the acquisition or contract field, list major projects that you have worked on if not included in your OER support form or job description. **PLEASE INDICATE AND CLEARLY DESCRIBE ANY DUTIES THAT YOU OR PERSONNEL UNDER YOUR DIRECTION HAVE RELATING TO OR IN ANY WAY INVOLVING ANY COMPANY WITH WHOM YOU ARE SEEKING EMPLOYMENT.**

12. List any projects that you were personally involved in or that were under your official responsibility:

13. Were you involved in any trade or treaty negotiations? Yes_____ No_____
Briefly explain:

14. With whom are you seeking employment?

15. Are you seeking employment with a foreign government, or with an entity that is owned, operated, or controlled by a foreign government? Yes_____ No_____
Briefly describe.

_____

_____

_____

16. What actions have you or someone acting on your behalf taken concerning your future employment?

_____

_____

_____

17. What is your proposed job title and description of duties? (You may attach a job description or job announcement).

_____

_____

_____

_____

18. Expected date of future employment? _____

19. Will you begin to work for a non-Government entity while on transition (formerly terminal) leave? Yes_____ No_____

20. Do you anticipate that your future employer will place you in a Federal work site?
Yes_____ No_____

NOTE: Military officers working during terminal leave (like all Federal employees) are prohibited from representing their new employer to the Government. Under 18 U.S.C. § 205, officers are prohibited from acting as an agent for a third party before any Federal agency. Accordingly, military officers are precluded from interacting on appearing in the Federal workplace of any agency as a contractor. Being present in Government offices on behalf of a contractor is a representation, which is prohibited by 18 U.S.C. §205. Of course, military officers on transition leave may begin work with the contractor, but only "behind the scenes" at contractor office or otherwise away from the Government workplace.

21. Will you take permissive temporary duty (PTDY)? Yes_____ No_____

NOTE: You should be familiar with the appropriate use of PTDY. The purpose of transition PTDY is to facilitate transition into civilian life for house and job hunting for Soldiers. It is impermissible to work while on PTDY.

22. Will you be working for a state or local governmental entity? Yes_____ No_____

NOTE: While on active duty (including transition leave) military officers are prohibited by 10 U.S.C. §973(b) from holding a "civil office" with a state or local government.

III

QUESTIONS RELATING TO PROCUREMENT INTEGRITY - 41 U.S.C. §423

1. Within the last year, have you been assigned to the following duties, or personally taken one of the following actions, involving a contract award, payment or claim in excess of $10,000,000?

A. Procuring Contracting Officer or Source Selection Authority. Yes ____ No ____

B. Serve as a member of a Source Selection Evaluation Board, or as a Chief of a Financial or Technical Evaluation Team. Yes ____ No ____

If "Yes," designate the position: _____

C. Program Manager, Deputy Program Manager, or Administrative Contracting Officer. Yes ____ No ____

If "Yes," designate the position: _____

D. Award of a contract, subcontract, modification, task order or delivery order, or payment of a contract claim. Yes ____ No ____

E. Establishing overhead or other rates. Yes ____ No ____

F. Approval of a contract payment. Yes ____ No ____

2. If you answered "Yes" to any of these actions, identify the contract in which you performed that function.

_____

_____

_____

_____

3. On each of those actions to which you answered "Yes" identify the date when you took the action or were last involved in that process.

_____

_____

_____

IV

REQUEST

I request a written ethics opinion based on the information I provided in this Questionnaire, and I certify the information to be true and correct to the best of my knowledge and belief.

Signature _____ Date _____

SEPARATE FROM ATTACHED PAMPHLET AND SUBMIT REQUEST TO THE ETHICS COUNSELOR WHERE YOU WERE LAST ASSIGNED.